IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DARRYL ASHMORE,

Plaintiff,

vs.

NFL PLAYER DISABILITY & NEUROCOGNITIVE BENEFIT PLAN,

Defendant.

Case No. 9:16-cv-81710-KAM

REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANT'S MOTION TO STRIKE CERTAIN MATERIALS OUTSIDE THE ADMINISTRATIVE RECORD

Defendant, the NFL Player Disability & Neurocognitive Benefit Plan ("Plan"), files this Reply Memorandum in Further Support of its pending Motion to Strike Certain Materials Outside the Administrative Record and respectfully requests that the Court strike Exhibit F (ECF 40-6) and Exhibit G (ECF 40-7) to Plaintiff's motion for summary judgment.

ARGUMENT

I. Ashmore Submitted Exhibit G *After The Board Made Its Decision*, And It Should Not Be Part Of The Administrative Record For This Reason Alone.

Exhibit G should not be included in the administrative record before this Court under any scenario. The material was not before the Disability Board at the time of its decision because Ashmore first submitted it to the Plan on August 24, 2016, ***one week after the Board reached its decision***. Ashmore's suggestion that the administrative record must contain anything that he

chose to submit *after* the Disability Board's final determination but "prior to the initiation of this lawsuit"[1] is flatly inconsistent with Eleventh Circuit precedent.[2]

II. Ashmore Submitted Exhibits F And G *After The Plan's Submission Deadline*, So Neither Exhibit Should Be Part Of The Administrative Record For This Reason.

The gist of Ashmore's response to the Plan's Motion to Strike is familiar. It exemplifies the same, defiant view that led to this entire dispute: Rules are not meant for Ashmore, and so the simple rule that Players must submit material for the Board's consideration at least 30 days prior to the Board's next meeting—*i.e.*, ***the rule that applies to everyone else***—should not apply to him. Ashmore's hostility to the Plan and its procedures knows no bounds. His attempt to undermine the Plan's 30-day submission deadline is meritless for two reasons.

First, the 30-day rule does not violate ERISA's full-and-fair-review mandate, as Ashmore argues.[3] The federal regulation that Ashmore cites, 29 C.F.R. § 2560.503-1(h)(2)(iv), merely gives plan participants the opportunity to submit new arguments and evidence during an administrative appeal. It does not preclude a plan from establishing reasonable deadlines by which a participant must do so. No regulation creates such a prohibition. Department of Labor claims regulations actually provide that Taft-Hartley boards (like the Disability Board) need not consider any appeal that is lodged within 30 days of its next regularly-scheduled quarterly meeting.[4] The Plan's 30-day rule derives from this general principle. It ensures that Plan staff

[1] Pl.'s Resp. to Def.'s Mot. to Strike ("Pl.'s Resp.," ECF 48) at 4.

[2] *See, e.g.*, *Jett v. Blue Cross & Blue Shield of Alabama, Inc.*, 890 F.2d 1137, 1140 (11th Cir. 1989) ("[T]he district court should limit its review to consideration of the material available to Blue Cross at the time it made its decision.").

[3] Pl.'s Resp. at 2-3.

[4] 29 C.F.R. § 2560.503-1(i)(3)(ii) ("In the case of a multiemployer plan with a committee or board of trustees designated as the appropriate named fiduciary that holds regularly scheduled meetings at least quarterly,… the appropriate named fiduciary shall instead make a benefit determination no later than the date of the meeting of the committee or board that immediately follows the plan's receipt of a request for review, unless the request for review

have adequate time to compile and prepare for the Board's review the "copious amounts" of material submitted by Ashmore and nearly every other Player seeking disability benefits.[5]

Second, when it comes to why Exhibit F and Exhibit G were not presented to the Disability Board, Ashmore is not blameless.[6] He knew about the 30-day rule. Plan staff told him about it on May 4, 2016—right after he made his appeal, and a full 2 ½ months before the Board's August 18, 2016 meeting.[7] Ashmore had no problem submitting "copious" records prior to the deadline.[8] Why he could not comply with it with respect to Exhibits F and G is a mystery, particularly when the material that he tried to submit on July 28 and August 24 was created long before he decided to send it to the NFL Player Benefits Office. The Court should not excuse Ashmore from complying with the 30-day deadline.

III. Exhibits F And G Are Irrelevant To The Sole Question Before The Court.

The question for this Court is whether the Disability Board reasonably denied Ashmore's application for benefits after he failed to attend several Plan neutral evaluations. Exhibits F and G have no bearing on that issue. Indeed, the Disability Board's decision was procedural in nature, not substantive, and it never considered any of the medical evidence that Ashmore submitted, much less the additional medical evidence he has tried to introduce via Exhibits F and G.

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is filed within 30 days preceding the date of such meeting. In such case, a benefit determination may be made by no later than the date of the second meeting following the plan's receipt of the request for review.").

[5] Pl.'s Resp. at 1 (noting that "[a]long with his appeal, Mr. Ashmore submitted copious amounts of medical records…").

[6] *See* Pl.'s Resp. at 2 (arguing that "Defendant, alone, is responsible for" the fact that Exhibit F and Exhibit G were not before the Board at the time of its decision, and stating that "Indeed, no fault can be attributed to Mr. Ashmore").

[7] 5/4/2016 Ltr. fr. P. Scott to D. Ashmore (694) ("If you wish to submit additional evidence in support of your appeal, it must be received in the NFL Player Benefits Office by July 19, 2016.").

[8] Pl.'s Resp. at 1 (noting that "[a]long with his appeal, Mr. Ashmore submitted copious amounts of medical records…").

If the Disability Board's decision is not upheld, "the proper course would be to remand [this case] to [the Plan] for a new determination."[9] The Court should not add Exhibits F and G to the existing administrative record.

CONCLUSION

The materials attached as Exhibit F and Exhibit G Plaintiff's motion for summary judgment were not before the Disability Board at the time of its decision. Therefore, following clear Eleventh Circuit precedent, the exhibits should not be part of the administrative record, and it would be reversible error for the Court to consider them. For these reasons, the Court should grant this motion and strike Exhibit F and Exhibit G.

Dated: December 21, 2017

Respectfully submitted,

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COUNSEL FOR DEFENDANTS

[9] *Jett*, 890 F.2d at 1140.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December, 2017, a true and correct copy of the foregoing REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANT'S MOTION TO STRIKE CERTAIN MATERIALS OUTSIDE THE ADMINISTRATIVE RECORD was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel for Plaintiff:

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